Haji Ali bin Haji Othman v Telekom Malaysia Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-31 OF 1997

GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JIEW FOOK JJCA

17 JUNE 2003

Civil Procedure *— Appeal — Point of law not pursued at first instance — Whether Court of Appeal would entertain such point on appeal*

Labor Law *— Domestic inquiry — Proceedings at inquiry — Proceedings prior to and at inquiry consonant with employer's duty to act fairly — Whether employee had been given reasonable opportunity to defend himself*

The appellant was dismissed from the respondent's employment. He sued the respondent in the High Court claiming, inter alia, a declaration that his dismissal was null and void. The High Court dismissed his action and he thus appealed to the Court of Appeal. In the Court of Appeal, it was argued on behalf of the appellant that his dismissal was bad for breach of both the *nemo judex* and *audi alteram partem* branches of the rules of natural justice.

Held, dismissing the appeal:

(1) The *nemo judex* point was not a point canvassed in the High Court. It is well settled that the Court of Appeal will not, save in limited cases, entertain a point of law not taken at first instance (see p 32F–G); *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 referred. The Court of Appeal would thus not entertain any argument on the *nemo judex* point in the instant case (see p 33G).

(2) With regard to the *audi alteram partem* point, there was no basis whatsoever in the submission that the appellant had not been given a reasonable opportunity of defending himself against the charges leveled against him. The steps taken by the respondent prior to the domestic inquiry and the proceedings at the inquiry were consonant to the duty to act fairly imposed on the respondent by law and art 5(1) read with art 8(1) of the Federal Constitution. The appellant may have misled himself in equating a domestic inquiry with a formal trial in a court (see p 33B–E); *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 653 followed.

Per curiam:

The *audi alteram partem* and *nemo judex* rules are the twin pillars of the rules of natural justice. These rules are directed at ensuring impartiality and fairness in public decision making. They are encompassed in arts 5(1) and 8(1) of the Federal Constitution and are directed at giving a citizen the minimum standards of fairness in all

forms of State action (see p 32D–E); *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; *Maneka Gandhi v Union of India* AIR 1978 SC 597; *Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577 referred. In the context of modern administrative law, they are treated as forming part of the wider doctrine of procedural fairness and vary in their content and applicability according to the facts of a given case (see p 32E–F); *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 653 referred.

[Bahasa Malaysia summary

Perayu telah dipecat dari pekerjaan oleh responden. Beliau telah menyaman responden di Mahkamah Tinggi menuntut, antara lain, satu deklarasi bahawa pemecatan beliau adalah terbatal dan tidak sah. Mahkamah Tinggi telah menolak tindakan beliau dan beliau oleh itu telah merayu ke Mahkamah Rayuan. Di Mahkamah Rayuan, ia telah dihujahkan bagi pihak perayu bahawa pemecatan beliau adalah salah kerana melanggar kedua-dua cabang *nemo judex* dan *audi alteram partem* rukun-rukun keadilan asasi.

Diputuskan, menolak rayuan tersebut:

(1) Perkara *nemo judex* bukan satu perkara yang telah dirayukan di Mahkamah Tinggi. Ia adalah tetap bahawa Mahkamah Rayuan tidak akan, kecuali dalam kes-kes terhad, melayan satu perkara undang-undang yang tidak diambilkira pada mulanya (lihat ms 32F–G); *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 dirujuk. Mahkamah Rayuan akan oleh itu tidak melayan apa-apa hujah tentang perkara *nemo judex* dalam kes semasa (lihat ms 33G).

(2) Berhubung perkara *audi alteram partem*, tiada asas langsung dalam penghujahan bahawa perayu tidak diberikan satu peluang munasabah untuk membela diri sendiri terhadap pertuduhan yang dikenakan terhadap beliau. Langkah-langkah yang diambil oleh responden sebelum siasatan domestik dan prosiding semasa siasatan adalah sejajar dengan kewajipan untuk bertindak dengan adil yang dikenakan ke atas responden oleh undang-undang dan perkara 5(1) dibaca dengan perkara 8(1) Perlembagaan Persekutuan. Perayu mungkin telah dengan sendiri terperdaya semasa menyamakan satu siasatan domestik dengan satu perbicaraan formal di suatu mahkamah (lihat ms 33B–E); *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 653 diikut.

Per curiam:

Rukun-rukun *audi alteram partem* dan *nemo judex* adalah 'the twin pillars of the rules of natural justice'. Rukun-rukun tersebut diarahkan

untuk memastikan tiada berat sebelah dan keadilan dalam membuat keputusan am. Rukun-rukun tersebut terangkum dalam perkara-perkara 5(1) dan 8(1) Perlembagaan Persekutuan dan diarahkan untuk memberikan warganegara standard-standard minima keadilan dalam semua bentuk tindakan Negeri (lihat ms 32D–E); *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; *Maneka Gandhi v Union of India* AIR 1978 SC 597; *Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577 dirujuk. Dalam konteks undang-undang pentadbiran moden, rukun-rukun tersebut dianggap sebagai membentuk sebahagian daripada doktrin keadilan prosedur yang lebih luas dan berbeza dengan kandungan dan pemakaian rukun-rukun tersebut menurut fakta-fakta suatu kes (lihat ms 32E–F); *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 653 diikut.]

Notes

For cases on appeals in civil procedure, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 526–1264.

For cases on domestic inquiry, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) para 739.

Cases referred to

Board of Education of the Indian Head School, The v Knight [1990] 1 SCR 653 (folld)

Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55 (refd)

Kanda v The Federation of Malaya [1962] MLJ 169 (refd)

Maneka Gandhi v Union of India AIR 1978 SC 597 (refd)

Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor [1981] 1 MLJ 64 (refd)

Pierson v Secretary of State for the Home Department [1997] 3 All ER 577 (refd)

Legislation referred to

Federal Constitution arts 5(1), 8(1)

Appeal from: Civil Suit No 22–172 of 1992 (High Court, Johor Bahru)

RK Menon (*Haji Khutubul Zaman* with him) (*RK Menon & Co*) for the appellant.

Sowaran Singh (*Raman Saad & Assoc*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This is the judgment of the court.

This appeal does not raise any new point of law. It merely has to do with the application of settled law to the peculiar facts of this case. The broad question at issue here is whether the appellant received procedural fairness

in the hands of the respondent before he was dismissed from the latter's employment. The brief facts relevant to that issue lie in a narrow compass. A

At all material times the appellant was in the respondent's employment. In 1990, disciplinary proceedings were commenced by the respondent against the appellant for misconduct. Five charges were formulated and served on the appellant. In a gist, they concern a form guarantee of the respondent said to have been dishonestly appropriated by the appellant and fraudulently used by him to obtain medical treatment for his wife from the General Hospital at Johor Bahru. A domestic inquiry found the appellant guilty on four charges but acquitted him of the fifth. By a letter dated 3 July 1990, the appellant was informed that he was dismissed from service and that he might avail himself of the domestic appellate machinery. The appellant then appealed, but without success. Dissatisfied, the appellant brought an action against the respondent claiming, inter alia, a declaration that his dismissal was null and void. After a trial at which viva voce evidence was led, the High Court found against the appellant and dismissed his action. The present appeal is directed against that order. B C D

Before us it was argued that the appellant's dismissal was bad for breach of both the *nemo judex* and the *audi alteram partem* branches — what Lord Denning in *Kanda v The Federation of Malaya* [1962] MLJ 169 called the twin pillars — of the rules of natural justice. These rules are directed at ensuring impartiality and fairness in public decision making. They are encompassed in arts 5(1) and 8(1) of the Federal Constitution and are directed at giving a citizen the minimum standards of fairness in all forms of State action (see *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; *Maneka Gandhi v Union of India* AIR 1978 SC 597; *Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577). In the context of modern administrative law, they are treated as forming part of the wider doctrine of procedural fairness and vary in their content and applicability according to the facts of a given case (see *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 653). E F

We find it unnecessary to deal with the complaint based on the alleged breach of the *nemo judex* rule because, as observed by Denis Ong JCA during argument and conceded by learned counsel for the appellant, this is a point not canvassed in the court below. The principle is too well settled that this court will not, save in limited cases, entertain a point of law not taken at first instance. If authority is needed for this it may be found in the decision of the Federal Court in *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 where Thomson LP said at p 58: G

> A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinized (*The Tasmania* (1890) 15 App Cas 223 at p 225). The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski v Wellington Corp* [1959] AC 53 at p 69) and the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at p 480) (per Lord Watson): H I
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> > 'When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or

> proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.'

In the present case, we found ourselves in a most difficult position so far as the point at issue is concerned. It was not raised in the pleaded case. It was not properly pursued in evidence. No argument was directed upon it. Accordingly, the judge was not given an opportunity to express his views upon it. It is in these circumstances that we decided not to entertain any argument on the *nemo judex* point.

So far as the *audi alteram point* is concerned, two separate and distinct submissions were advanced. The first was that the appellant had not been given a reasonable opportunity of defending himself against the charges levelled against him. We found no basis whatsoever in this complaint. The High Court, in its judgment, when dealing with this part of the case said:

> ... the Inquiry Panel accommodated the plaintiff's request on the procedure to be followed in the inquiry. So what is he complaining about not being heard — the rule of *audi alteram partem* not being complied as alleged by the plaintiff therefore has no application at all in this case. At the end of the proceedings, the plaintiff expressed his satisfaction over the conduct of the Inquiry Panel in carrying out the inquiry.

In our judgment this is an entirely proper direction given the facts and the evidence placed before the trial judge. We find the steps taken by the respondent prior to the inquiry and the proceedings at the inquiry to be consonant to the duty to act fairly imposed on the respondent by law and art 5(1) read with art 8(1) of the Federal Constitution. Where the appellant has, with respect, misled himself is, we think, in equating a domestic inquiry with a formal trial in a court. This is not the law. In this regard, we agree and gratefully adopt the view expressed by L'Heureux-Dubé J speaking on behalf of the majority of the Supreme Court of Canada in *The Board of Education of the Indian Head School v Knight*:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.

For the reasons already given, we dismissed this appeal and made those orders usually consequent upon a dismissal.

Appeal dismissed.

Reported by Andrew Christopher Simon